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Proposed Co-Lead Counsel for the Class*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALLAN J. NICOLOW, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

HEWLETT-PACKARD COMPANY, LEO
APOTHEKER, MARGARET C.
WHITMAN, CATHERINE A. LESJAK, and
JAMES T. MURRIN,

Defendants.

Case No. CV-12-05980 CRB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN FURTHER SUPPORT
OF THE MOTION OF PGGM, OREGON
AND OKLAHOMA FOR APPOINTMENT
AS LEAD PLAINTIFF AND IN
OPPOSITION TO THE COMPETING
MOTIONS**

Date: March 1, 2013
Time: 10:00 a.m.
Room: 6 – 17th Floor
Judge: Charles R. Breyer

(Additional captions on following pages)

1 DAVIN POKOIK, Individually and on
2 Behalf of All Others Similarly Situated,

3 Plaintiff,

4 v.

5 HEWLETT-PACKARD COMPANY,
6 AUTONOMY CORPORATION PLC,
7 DELOITTE LLP, LEO APOTHEKER,
8 MARGARET C. WHITMAN, CATHERINE
A. LESJAK, JAMES T. MURRIN,
MICHAEL R. LYNCH, and SUSHOVAN
HUSSAIN,

9 Defendants.

Case No. CV-12-06074 CRB

10 PAUL NEUMANN,

11 Plaintiff,

12 v.

13 HEWLETT-PACKARD COMPANY,
14 MARGARET C. WHITMAN, LEO
15 APOTHEKER, JAMES T. MURRIN,
CATHERINE A. LESJAK, and MARK
HURD,

16 Defendants.

Case No. CV-13-00284 CRB

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I. SUMMARY OF ARGUMENT

PGGM, Oregon and Oklahoma have the largest financial interest in the relief sought in this litigation of any investor seeking appointment as Lead Plaintiff.¹ Under the Ninth Circuit's well-established standards for selecting lead plaintiff, the Funds are presumptively the "most adequate plaintiff" and should be appointed Lead Plaintiff under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, *et seq*; *In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002). No other movant claims a financial interest that even approaches that of the Funds, regardless of the methodology used to calculate losses or the two class periods asserted in the pending complaints.²

Movant	Loss in "Short Class Period" 8/19/11-11/20/12		Loss in "Long Class Period" 2/20/08-11/20/12	
	FIFO ³	LIFO	FIFO	LIFO
PGGM, Oregon and Oklahoma	\$60,210,145	\$51,111,664	\$118,884,690	\$85,256,418
VRS	\$43,460,871*	\$33,124,020*	\$53,387,099	\$39,985,010*
Pension Funds	\$10,839,414*	\$10,839,414*	\$46,982,045*	\$35,136,659*

As the above chart demonstrates, the losses sustained by PGGM, Oregon and Oklahoma are more than *twice as large* as those of the next-largest movant and, in fact, are larger than the

¹ On January 25, 2013, PGGM Vermogensbeheer B.V. ("PGGM"), the State of Oregon by and through the Oregon State Treasurer on behalf of the Common School Fund and, together with the Oregon Public Employees Retirement Board, on behalf of the Oregon Public Employees Retirement Fund ("Oregon") and Oklahoma Teachers Retirement System ("Oklahoma") (collectively the "Funds") filed the instant motion. ECF No. 38.

² The five other movants are: (1) Virginia Retirement System ("VRS"); (2) Central States, Southeast and Southwest Areas Pension Fund and the Strathclyde Pension Fund ("Pension Funds"); (3) IBEW Local 640/Arizona Chapter NECA Pension Trust Fund and IBEW Local Union Nos. 570 and 518 and Southern Arizona NECA Pension Trust Fund ("Electrical Workers"); (4) Peng Cheng Wang, Lloyd G. Smiley, and Galen A. Etemad ("HP Investor Group"); and (5) David Wagner ("Wagner"). Wagner and Electrical Workers withdrew their motions. ECF Nos. 68, 69. The HP Investor Group supports the motion of the Funds. ECF No. 70.

³ "FIFO" refers to losses calculated using a First-In-First-Out methodology; "LIFO" refers to losses calculated using a Last-In-First-Out methodology. "*" Indicates losses calculated by the Funds where figures were not provided by the movants.

1 **combined losses** of all other movants under the longest-filed class period. The Ninth Circuit
 2 equates the largest loss with having the greatest financial interest in the litigation. *Cavanaugh*,
 3 306 F.3d at 732 (“So long as the plaintiff with the **largest losses** satisfies the typicality and
 4 adequacy requirements, [it] is entitled to lead plaintiff status”). This Court has repeatedly held
 5 that losses determine financial interest. *See, e.g., Rafton v. Rydex Series Funds, et al.*, No. C 10-
 6 1171 CRB, 2010 WL 2629579, at *5 (N.D. Cal. June 29, 2010) (Breyer, J.) (“the district court
 7 must consider the **losses** allegedly suffered by the various plaintiffs”) (citation and internal
 8 quotations omitted).⁵

9 In addition to asserting the largest financial interest in this litigation, the Funds—each of
 10 which has experience serving as Lead Plaintiff as part of a group of institutional investors—also
 11 satisfy the adequacy and typicality requirements of Rule 23. *See* ECF No. 40, Ex. C. at ¶11. The
 12 PSLRA expressly allows for Lead Plaintiff groups, and this Court has repeatedly appointed
 13 groups to serve as Lead Plaintiff. *See Plichta v. SunPower Corp.*, No. 09-cv-05473-CRB, ECF
 14 No. 70 (N.D. Cal. Mar. 5, 2010) (Breyer, J.) (appointing group of three institutional investors;
 15 approving Kessler Topaz and Bernstein Litowitz as Co-Lead Counsel) (“*SunPower*”) (ECF No.
 16 40, Ex. D). Tellingly, four of the six motions in this case were filed by groups and VRS, which
 17 moved alone in this case, is currently serving as part of a Lead Plaintiff group in another
 18 securities class action. *Deangelis v. Corzine*, 11-cv-7866-VM, ECF No. 140 (S.D.N.Y. Jan. 20,
 19 2012).⁶

20 As evidenced by their Joint Declaration, PGGM, Oregon and Oklahoma joined together
 21 on their own initiative to prosecute the case because of their shared views and goals. *See* ECF
 22 No. 40, Ex. C. They have conferred repeatedly without counsel, have a plan to vigorously
 23 prosecute and oversee the action, and have enacted specific measures in that regard, including
 24 directing counsel to enter into a Joint Prosecution Agreement. *Id.* at ¶¶9-11, ¶¶15-18. The Joint
 25

26 ⁵ All emphasis added unless otherwise indicated. Unless otherwise noted, references to “ECF
 No. ___” are to filings in *Nicolow v. Hewlett-Packard Company*, No. 12-cv-05980-CRB.

27 ⁶ A copy of the order appointing VRS and Her Majesty the Queen in Right of Alberta as Lead
 28 Plaintiff is attached as Exhibit A to the Declaration of Blair A. Nicholas (“Nicholas Declaration”) submitted concurrently herewith.

1 Declaration provides the evidence concerning the formation and function of the Funds that is all
 2 courts require when appointing a Lead Plaintiff group. *See In re Versata, Inc. Sec. Litig.*, No. C
 3 01-1439 SI, 2001 WL 34012374, at *5 (N.D. Cal. Aug. 20, 2001) (citing declaration as basis for
 4 appointing group).

5 Recognizing that the Funds are the most adequate plaintiff under the PSLRA, the HP
 6 Investor Group, which initially filed a motion seeking Lead Plaintiff status, filed a notice
 7 supporting the motion of the Funds. ECF No. 70. PGGM, Oregon and Oklahoma are the only
 8 movant whose application is supported by another lead plaintiff movant.

9 Because the Funds have the largest financial interest and have made a preliminary
 10 showing of their typicality and adequacy, they are entitled to the strong presumption that they are
 11 the most adequate plaintiff, which can only be rebutted “upon *proof*” that the members of the
 12 group are inadequate or atypical. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). No such “proof” exists,
 13 and the Class will be well-served under the leadership of the Funds. Accordingly, PGGM,
 14 Oregon and Oklahoma should be appointed Lead Plaintiff and their motion should otherwise be
 15 granted. *See Cavanaugh*, 306 F.3d at 739 (group asserting largest financial interest “shall” be
 16 appointed if competing movants fail to provide “evidence” of inadequacy).

17 **II. ARGUMENT**⁷

18 **A. PGGM, Oregon And Oklahoma Should Be Appointed Lead Plaintiff**

19 The PSLRA creates a presumption that the Lead Plaintiff is “the person or group of
 20 persons” that “has the largest financial interest in the relief sought by the class” and “otherwise
 21 satisfies the requirements of Rule 23.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). At the lead plaintiff
 22 stage, all that is required to satisfy Rule 23 is a preliminary showing that the proposed lead
 23 plaintiff’s claims are typical and adequate. *See, e.g., Russo v. Finisar Corp.*, No. 5:CV 11-
 24 01252-EJD, 2011 WL 5117560, at *3 (N.D. Cal. Oct. 27, 2011) (movant with largest loss that
 25 made necessary preliminary showing of typicality and adequacy appointed lead plaintiff). Once
 26

27 ⁷ In accordance with Local Rule 7-4(a)(3)-(4), PGGM, Oregon and Oklahoma respectfully refer
 28 the Court to the statement of issues to be decided and statement of facts included in their initial
 motion. *See* ECF No. 38 at 2, 4-6.

that strong presumption is triggered (as it has been by PGGM, Oregon and Oklahoma here), it may only be rebutted upon “*proof*” that the presumptive Lead Plaintiff will not fairly represent the interests of the Class. *See Cavanaugh*, 306 F.3d at 729 n.2 (“That the presumption is rebuttable does not mean that it may be set aside for any reason that the court may deem sufficient. Rather, the statute provides that the presumption ‘may be rebutted only upon proof’”). Indeed, the PSLRA does not “authorize the district judge to examine the relative merits of plaintiffs seeking lead status on a round-robin basis. The statutory process is sequential: The court must examine potential lead plaintiffs one at a time, starting with the one who has the greatest financial interest, and continuing in descending order *if and only if* the presumptive lead plaintiff is found inadequate or atypical.” *Cavanaugh*, 306 F.3d at 732.

**B. PGGM, Oregon And Oklahoma Have The Largest
Financial Interest In The Relief Sought By The Class**

Under any class period and any loss methodology, it is undeniable that PGGM, Oregon and Oklahoma have the largest financial interest in the litigation.⁸ As shown in the above chart, the Funds suffered greater losses than any competing movant under either FIFO or LIFO in both the Long Class Period and Short Class Period. The Ninth Circuit and other courts in this District have consistently held that a movant’s loss is the most important factor in determining which movant has the largest financial interest. *See Cavanaugh*, 306 F.3d at 732; *Bruce v. Suntech Power Holdings Co. Ltd.*, No. CV 12-04061 RS, 2012 WL 5927985, at *2 (N.D. Cal. Nov. 13, 2012) (“While the PSLRA does not specify how to calculate the largest financial interest, approximate losses in the subject securities is the preferred measure.”).⁹ Indeed, in every PSLRA case before this Court, the Court has appointed the movant claiming the largest *loss* as Lead

⁸ As explained in the Funds’ opening brief, the complaints filed in this action assert two different class periods—one beginning August 19, 2011 (the “Short Class Period”) and one beginning on February 20, 2008 (the “Long Class Period”)—both end on November 20, 2012.

⁹ *See also Armour v. Network Assoc., Inc.*, 171 F. Supp. 2d 1044, 1051 (N.D. Cal. 2001) (movant had “the largest financial interest in the relief sought by the class by reason of the fact that it has suffered the greatest financial loss of all proposed lead plaintiffs”); *In re Century Aluminum Co. Sec. Litig.*, No. C 09-1001 SI, 2009 WL 2905962, at *4 (N.D. Cal. Sept. 8, 2009) (appointing lead plaintiff movant with largest loss); *Versata*, 2001 WL 34012374, at *8 (same); *see also Tanne v. Autobyte, Inc.*, 226 F.R.D. 659, 665 (C.D. Cal. 2005) (same).

Plaintiff so long as that movant otherwise satisfied Rule 23. *Rydex*, 2010 WL 2629579, at *5 (the “district court must consider the losses allegedly suffered by the various plaintiffs”); *Smajlaj v. Brocade Commc’ns Sys. Inc.*, No. C 05-02042 CRB, 2006 U.S. Dist. LEXIS 97618, at *9, *12-13 (N.D. Cal. Jan. 12, 2006) (Breyer, J.) (utilizing loss to determine financial interest); *Carson v. Clarent Corp.*, No. C 01-03361 CRB, 2001 WL 1782712, at *2 (N.D. Cal. Dec. 14, 2001) (Breyer, J.) (lead plaintiff movant “with a \$3.1 million interest[,] is thus presumptively the most adequate plaintiff”). In light of the overwhelming weight of the law supporting the use of losses to determine financial interest, it is not surprising that each of the lead plaintiff movants in the action emphasized their own losses as the basis for asserting their financial interest.¹⁰

Because PGGM, Oregon and Oklahoma incurred a loss far greater than that of every other movant, they have the largest financial interest in the litigation under the well-established law in this Circuit and the jurisprudence of this Court.

C. PGGM, Oregon And Oklahoma Are A Proper Group Under The PSLRA And Satisfy The Adequacy And Typicality Requirements Of Rule 23

The PSLRA expressly allows for groups to serve as Lead Plaintiff, 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), and courts throughout the country routinely recognize the propriety of appointing such groups when they have shown that they are cohesive and capable of overseeing counsel and the litigation. *See Versata*, 2001 WL 34012374, at *6-7 (appointing group of investors with largest loss that “submitted a declaration providing background information and articulating why [they are] seeking lead plaintiff status as part of the asserted group”); *Suntech*, 2012 WL 5927985, at *3 (appointing group of investors with largest loss that “submitted a joint declaration attesting that each is knowledgeable about the litigation, that they are working together, and that they are committed to protecting the interests of the Class”); *see also In re Bank of Am. Corp. Sec., Deriv. and ERISA Litig.*, 258 F.R.D. 260, 270 (S.D.N.Y. 2009) (appointing group of institutional investors, including PGGM, that had the largest loss and demonstrated their cooperative efforts through a joint declaration); *In re Cendant Corp. Litig.*,

¹⁰ See ECF No. 57 at 10; ECF No. 49 at 3; ECF No. 38 at 1; ECF No. 37 at 1; ECF No. 42 at 1.

264 F.3d 201, 266-67 (3d Cir. 2001) (cohesive group of sophisticated investors with largest loss and the ability to oversee counsel and litigation ideal group under the PSLRA).

Indeed, this Court has previously appointed Lead Plaintiff groups in at least five separate cases. *See SunPower* (appointing group of three institutional investors; approving Kessler Topaz and Bernstein Litowitz as Co-Lead Counsel); *Rydex*, 2010 WL 2629579; *see also Watkins v. Shoretel Inc.*, No. 08-cv-00271-CRB, ECF No. 27 (N.D. Cal. Apr. 25, 2008); *In re Leadis Tech., Inc. Sec. Litig.*, 05-cv-00882-CRB, ECF No. 19 (N.D. Cal. June 10, 2005); *In re Solelectron Corp. Sec. Litig.*, 03-cv-00986-CRB, ECF No. 53 (N.D. Cal. June 2, 2003). Attached as Exhibits B-D to the Nicholas Declaration. Lead Plaintiff groups have achieved many of the largest recoveries under the PSLRA. Most recently, PGGM served together with a group of United States pension funds as Lead Plaintiff in the *Bank of America* securities litigation and recovered over \$2.4 billion for investors—the largest recovery in any case arising from the recent financial crisis, and one of the largest recoveries ever achieved in a securities class action. A lead plaintiff group was also responsible for the over \$3.3 billion recovery in *Cendant* and the \$3.2 billion recovery in the securities class action involving *Tyco International, Ltd.*, the third- and fourth-largest securities class action settlements in history, among other significant recoveries. The record of success established by such groups explains why the majority of the pending motions in this action were filed by groups and why even movants like VRS, who acted alone in this case, are serving as part of lead plaintiff groups in other complex litigations.

As reflected in *Versata*, courts assess the propriety of a lead plaintiff group by considering evidence of how and why the group formed and how it will function. *See Suntech*, 2012 WL 5927985, at *3; *Reimer v. Ambac Fin. Grp., Inc.*, No. 08 Civ. 411 (NRB), 2008 WL 2073931, at *3 (S.D.N.Y. May 9, 2008) (appointing group of sophisticated institutions that submitted joint declaration explaining their coordination of the litigation). Here, the Joint Declaration submitted by Oregon, Oklahoma and PGGM provides the necessary evidence on which the Court can assess the group.¹¹ *See* ECF No. 40, Ex. C. Specifically, the Joint

¹¹ In the one published case where this Court declined to appoint a Lead Plaintiff group that had the largest financial interest, the group in question filed its motion two weeks too late. *See Clarent*, 2001 WL 1782712, at *2. While the Court declined to treat another movant as a group

1 Declaration demonstrates that PGGM, Oregon and Oklahoma are large sophisticated institutional
2 investors with a substantial financial stake in the litigation. *Id.* at ¶¶2-7. The Funds understand
3 and accept the duties and obligations attendant with serving as Lead Plaintiff under the PSLRA
4 and have served or are currently serving as lead plaintiff in complex securities class actions as
5 part of a cohesive group of sophisticated institutions based in the United States and abroad, such
6 as the group here. *Id.*

7 Moreover, the Funds are highly incentivized to vigorously prosecute the action against,
8 and recover the maximum amount possible from, all potentially culpable defendants. *Id.* at ¶8.
9 Further, the Funds independently determined to seek joint appointment as lead plaintiff for the
10 benefit of the class and engaged in extensive discussions between and among one another prior to
11 the filing of their motion. *Id.* at ¶¶9-11. Through those discussions, the Funds enacted measures
12 to oversee and prosecute the action, including directing counsel to enter into a Joint Prosecution
13 Agreement, in the best interests of all Class members. *Id.* at ¶¶14-18. The Joint Declaration
14 more than satisfies the evidentiary requirement set forth by Judge Illston in *Versata*.

15 There can also be no question that the Funds satisfy the typicality and adequacy
16 requirements of Rule 23. *See City of Harper Woods Emps. Ret. Sys. v. AXT, Inc.*, No. C 04-
17 04362 MJJ, 2005 WL 318813, at *4 (N.D. Cal. Feb. 7, 2005). The Funds are typical because
18 they suffered the same injures as a result of the same course of defendants' misconduct (the
19 purchase of HP securities at artificially inflated prices pursuant to defendants'
20 misrepresentations), and assert claims under the Exchange Act. *See id.* ("claims are typical, if
21 not identical to the claims of other members of the proposed class . . . [when] like other members
22 of the class, [movant] alleges that he acquired [] securities during the Class Period at inflated
23 prices and allegedly suffered damages thereby").

24 The Funds are also adequate. *See Id.* at *4. No antagonism exists between their interests
25 and those of absent class members; rather, their interests are squarely aligned. In addition,
26 PGGM, Oregon and Oklahoma have retained counsel experienced in prosecuting securities class

27 _____
28 in *Clarent*, that group was comprised of individuals rather than institutions, and failed to submit
any documentation of how it was formed or how it would operate. *Id.*

actions vigorously and efficiently. *See* ECF No. 40, Ex. C. at ¶¶14-16. The Funds have also incurred substantial financial harm from their purchases of Hewlett-Packard Company securities and, therefore, have a strong interest in ensuring the vigorous prosecution of the action. Finally, there is no evidence of collusion.

III. CONCLUSION

For the foregoing reasons, PGGM, Oregon and Oklahoma respectfully request that the Court: (1) appoint PGGM, Oregon and Oklahoma as Lead Plaintiff; (2) approve their selection of Kessler Topaz and Bernstein Litowitz as Co-Lead Counsel for the class; (3) consolidate all related actions; and (4) deny all other motions.

Dated: February 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 8, 2013.

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/s/ Blair A. Nicholas

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